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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 901

EDUARD VON DER HEYDT, LIBERTAS, S.A., AND RATIO, S.A., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AND ELIZABETH RUDEL SMITH, TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no formal opinion. Its findings of fact and conclusions of law are reproduced at R. 1023A–1041A.[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B, pp. 18–26) is reported at 299 F. 2d 459. An earlier opinion of the court of appeals (Pet. App. C, pp. 27–34), remanding the case for an entry of findings of fact, is reported at 251 F. 2d 17.

[1] "R." refers to the Joint Appendix in the court of appeals, which has been filed in this court as part of the record.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1962. A timely petition for rehearing was denied on February 20, 1962 (Pet. App. D, p. 35). The petition for a writ of certiorari was filed on April 24, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district court violates the Fifth Amendment by dismissing a plaintiff's case pursuant to Fed. R. Civ. P. 37(b)(2) because of a willful and bad-faith refusal to comply with pretrial production orders for the production of documents.

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law; * * *.

2. Section 9(a) of the Trading With The Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 9(a), provides in pertinent part:

> SEC. 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property

or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

3. The Federal Rules of Civil Procedure provide in pertinent part:

Rule 33. —*Interrogatories to Parties*

Any party may serve upon any adverse party written interrogatories to be answered

by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories * * *.

Rule 34.—*Discovery and Production of Documents and Things for Inspection, Copying, or Photographing*

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control * * *.

Rule 37.—*Refusal to Make Discovery: Consequences*

(a) *Refusal to Answer.*

* * * * *

(b) *Failure to Comply With Order.*

(1) *Contempt.* * * *

(2) Other Consequences. If any party * * * refuses to obey * * * an order made under Rule 34 to produce any document or other thing for inspection * * *, the court may make such orders in regard to the refusal as are just, and among others the following:

* * * * *

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party: * * *

* * * * *

(d) *Failure of Party to Attend or Serve Answers.* If a party * * * fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

STATEMENT

This action was instituted against the Attorney General and the Treasurer of the United States on March 5, 1954, under Section 9(a) of the Trading With The Enemy Act, as amended, by petitioners, a

Swiss citizen and two corporations beneficially owned and controlled by him, for the return of property vested by the Attorney General pursuant to the Act (R. 2A–4A). The respondents' answer to the complaint (R. 4A–6A) placed in issue petitioners' enemy status by reason of the individual petitioner's alleged activities on behalf of the German Intelligence Service during World War II, their business transactions in enemy or enemy-occupied territory, and their "enemy taint" within the meaning of *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480.

On February 8, 1956, the district court granted respondents' motion (R. 49A–52A) under Rule 34, Fed. R. Civ. P., for an order requiring the petitioners to make available for inspection certain documentary evidence and for an order under Rule 37, Fed. R. Civ. P., compelling the individual petitioner to answer an interrogatory served upon him previously (R. 119A–124A).

Since the petitioners failed to produce the documents and to answer the interrogatory within the time set by the court, the respondents moved on March 7, 1956, for dismissal of the complaint (R. 124A). The motion was granted after hearing (R. 137A–143A), but judgment was withheld on petitioners' representations that production would be forthcoming shortly (R. 143A–149A). On production of some of the documents the order for dismissal was vacated and the time for production was extended to July 1, 1956 (R. 209A).

Thereafter additional documents—but far from all those demanded—were produced, whereupon on August 28, 1956, the respondents renewed their motion

for dismissal for failure to produce specific documents covered by the order for production, and for failure to answer responsively an interrogatory propounded to the individual petitioner (R. 214A). After argument on the motion, the district court filed a memorandum opinion on October 8, 1956 (R. 352A-353A), stating in part—

> The chronology of the discovery procedure in this case indicates that plaintiff Von Der Heydt, through his agents, has repeatedly denied possession or control of additional documents but thereafter has produced the denied documents, or copies of them, for examination. Records made available to the defendants for examination indicate rather positively the existence of other records referring to transactions enumerated in the records made available. Both the pattern of plaintiff's conduct and the nature of the documents furnished, as well as the nature of documents not furnished and reported as no longer in existence, suggest the strong probability that the records were carefully reviewed and classified as to their probable impact upon the plaintiffs' claim prior to being made available to the defendants. The breaks in the chronology of records and correspondence made available, as well as the entire pattern of the conduct of the plaintiffs' employees and representatives, raise a substantial doubt in my mind as to the weight to be given to plaintiffs' affidavits denying in general terms the possession or control of other documents.

The court, however, felt that it could not resolve the numerous factual issues tendered "upon a mere

battle of affidavits" (R. 353A). Before ruling on the motion, the court ordered a hearing which ultimately lasted nine days, and in the course of which it heard extensive testimony from both parties and received numerous exhibits. At the conclusion of the hearing the court granted the respondents' motion and on December 18, 1956, it entered an order and judgment (R. 353A–354A) dismissing petitioners' complaint.

In ruling upon the motion, the district court said, in part (R. 817A–818A):

> All documents which were called for by the Court's order not having been produced, and the plaintiffs not having satisfactorily shown to the Court that such documents do not exist, and the plaintiffs not having satisfactorily explained to the Court why they have not been produced; and the pattern of the conduct of the plaintiffs' duly authorized representatives, but not including present counsel, clearly showing an unwillingness on their part to make a full disclosure to the defendants; and the plaintiffs' answers to the defendants' interrogatory No. 23 being too vague and wholly insufficient since the answers furnish no details as to any specific documents, I find that the discovery order of this Court of February 9, 1956, has not, in good faith been complied with.

On appeal from the order of dismissal, the court of appeals held that, in view of the size of the record and the substantiality of the issues, it was unable to afford an adequate appellate review with-

out specific findings. Accordingly, it remanded the case for such findings (R. 951A–957A). *Van der Heydt* v. *Rogers*, 251 F. 2d 17.

After disposing of an intervening motion—not drawn into issue here—the district court entered findings of fact and conclusions of law (R. 1023A–1041A), followed on February 13, 1961, by an order of dismissal with prejudice (R. 1042A).

On appeal, the court of appeals affirmed, holding that the comprehensive findings filed by the district court as to the individual petitioner's studied efforts to avoid production were amply supported by the evidence (Pet. App. B, pp. 22–23). Regarding petitioner's failure to answer in good faith an interrogatory, the court further held that the lower court's findings were based upon "overwhelming evidence" (Pet. App. B, p. 24).

ARGUMENT

1. Petitioners do not attack the concurrent finding of the two lower courts that they willfully and in bad faith thwarted the trial court's valid processes. They attempt to construct a constitutional argument by suggesting that the dismissal was rendered as a "penalty" (Pet. 9).

The court of appeals properly rejected this argument as baseless, stating "there is no showing that that was the case" (Pet. App. B, p. 25). On the contrary, the district court's conclusion—which the court of appeals found "amply justified" (*ibid.*)—left no doubt as to the reason for the dismissal (R. 1040A):

> Plaintiff von der Heydt's failure in good faith to produce records and answer an interrogatory * * * deprives defendants of a full and fair opportunity to prepare their defenses and would deprive this Court of evidence indispensable to a proper adjudication of the issues.

There is no constitutional infirmity under such circumstances in the exercise by a trial court of its dismissal powers under Rule 37(b)(2)(iii). *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209-210.

2. Petitioners' endeavor to bolster their plea for a trial on the merits (Pet. 8) by pointing to the result reached by this Court in *Societe Internationale*, *supra*, is self-defeating. There this Court held that Rule 37—

> * * * should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not *willfullness, bad faith, or any fault of petitioner*. [357 U.S., at 212; emphasis added].

The record in this case suggests no inability on the part of petitioners to comply with the pretrial order for production; it rather shows crass bad faith and willful refusal of compliance—the very elements which this Court found would amply justify dismissal. A party invoking the aid of a court has no license under the Constitution to invoke such aid on its own terms. Dismissal of an action under the circumstances here presented is, we submit, eminently proper and in the interest of a fair and speedy administration of justice

in the federal courts. There is, therefore, no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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